No. 14,843

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANCES FARRINGTON WHITTEMORE, RUTH FARRINGTON LEAVEY, EDMOND H. LEAVEY, JR., CATHARINE FARRINGTON HITE, JOAN WHITTEMORE CLOSE, CATHARINE ANDERSON LEAVEY, ALICE FARRINGTON LEAVEY, CHARLES HARRISON HITE, PATRICIA FARRINGTON HITE and WALLACE RIDER FARRINGTON CLOSE,
Appellants,

vs.

ELIZABETH P. FARRINGTON, JOHN FARRINGTON, BEVERLY FARRINGTON RICHARDSON and CALVIN C. MCGREGOR, Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii,
Appellees.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

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Appellees.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS.

PRELIMINARY STATEMENT.

Appellees, after conceding jurisdiction as shown by Appellants' affidavit (R. 53; Appellees' Brief, pp. 1-2), interposed a Motion to Dismiss on the ground that there is not the requisite value in controversy and the appeal involves no substantial question arising under the Constitution and the laws of the United States.

By leave of Court this Memorandum is filed which, we submit, clearly demonstrates that the Appellees' Motion to Dismiss is without merit.

QUESTIONS INVOLVED.

1. Is a final decision of the Supreme Court of the Territory of Hawaii in a prohibition proceeding challenging the competency of the trial court appealable under 28 U.S.C. § 1293, where the principal controversy involves the determination by the trial court of conflicting claims of trust beneficiaries to property rights having a value in excess of $5,000?

2. Are Appellants' arguments that the judgment appealed from involves the Fifth Amendment, Section 84 of the Hawaiian Organic Act, and authority exercised under Federal law, so colorable as to leave this Court without jurisdiction to entertain the appeal?

I.

JURISDICTION OF THIS COURT MUST BE DETERMINED BY EXAMINATION OF THE ENTIRE CONTROVERSY OUT OF WHICH THE DECISION OF THE SUPREME COURT OF HAWAII AROSE.

Appellees' theory, found in their Memorandum, is that since the prohibition proceeding is an "original proceeding" in the Supreme Court respecting the right of a particular court judge to sit, no value measurable in money is involved in the controversy.

> "The right to have one judge sit in place of another cannot be measured in money." (Appellees' Memo. p. 3.)
>
> It "involves 'no value in controversy' since it cannot be measured in money." (Appellees' Memo. p. 8.)
>
> "Nor can the jurisdictional amount be met by reference to possible cases other than the particular case on appeal." (Appellees' Memo. p. 5.)

At the oral argument the Appellees conceded that the appeal statute (28 U.S.C. § 1293) did not preclude this Court from examining the controversy pending before Territorial Circuit Court Judge McGregor. Appellees then proceeded to argue, inaccurately, we submit, that no ascertainable value was involved in said controversy.

It is clear under the procedure of the Territory of Hawaii a writ of prohibition is essentially an appellate process, the purpose of which is to preserve the integrity of a proceeding pending in an inferior tribunal where an ordinary appeal would be inadequate. The Territorial statute defines prohibition as follows:

> "Definition. This is a mandate which issues in the name of the Territory from the supreme court, or from any justice thereof, or a circuit judge, directed to the judge and the party suing in any inferior court, forbidding them to proceed any further in the cause, on the ground that the cognizance of such cause does not belong to such court, or that the cause or some collateral matter

arising therein is beyond its jurisdiction, or that it is not competent to decide it." (Sec. 10270, Revised Laws of Hawaii, 1945.)

The court below held that it had jurisdiction and power to issue the writ, stating in its opinion:

"It is the conclusion of this Court:

"(1) That, as the petition for writ of prohibition alleged personal bias and prejudice of the trial judge and so in effect challenges the competency of the trial court to act further in and decide pending matters in the case below, being said Civil No. 139, this Supreme Court has jurisdiction herein and the power to issue a writ of prohibition, by virtue of Section 10270, Revised Laws of Hawaii 1945;" (R. 18.)

The question on appeal here is therefore whether the court committed error in failing to disqualify the Territorial Circuit Court Judge. This portion of the holding by the court below, as quoted above, accords with the principle stated in *Minnesota & Ontario Paper Co., et al. v. Molyneaux,* 70 F. 2d 545 (C.C.A. 8th, 1934):

"'* * * Where such appellate jurisdiction exists, the necessary original writs may be entertained for any purpose necessary to protect the full exercise of that jurisdiction. One situation classed within such protection of appellate jurisdiction is where the right of appeal exists but because of the presence of ' "circumstances imperatively demanding" a departure from the ordinary remedy by * * * appeal' (Whitney v. Dick, 202 U.S. 132, 140, 26 S. Ct. 584, 588, 50 L. Ed. 963) is neces-

> sary. In such situation, the writs may be employed 'as an auxiliary process, and * * * as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways.' United States v. Beatty, 232 U.S. 463, 467, 34 S. Ct. 392, 394, 58 L. Ed. 686. This rule has been recognized in this, Greyerbiehl v. Hughes Elec. Co. (C.C.A.) 294 F. 802, 805, and Turner v. United States (C.C.A.) 14 F. (2d) 360, 361, and other courts, Pickwick-Greyhound Lines v. Shattuck, 61 F. (2d) 485, 487 (C.C.A. 10); Blake v. District Court, 59 F. (2d) 78, 79 (C.C.A. 9)."

The test of whether this Court has jurisdiction under 28 U.S.C. § 1293 to review the final judgment of the Supreme Court of Hawaii in a prohibition proceeding is whether this Court would have jurisdiction under 28 U.S.C. § 1293 to review the appeal in the principal case of which the prohibition proceeding is in aid. There is a clear analogy between the jurisdictional question raised by the Motion to Dismiss and the jurisdictional question arising in a separate proceeding in aid of or ancillary to a principal proceeding in a district court of the United States. It has been uniformly held that the jurisdiction of a federal court in an ancillary suit or a suit in aid of a principal case will be determined by reference to the jurisdictional basis of the principal case.

54 *Am. Jur., United States Courts,* Sec. 32, pp. 688 and 689:

> "Ancillary, Auxiliary, and Supplemental Proceedings.—Jurisdiction of ancillary, dependent, or

supplemental suits or proceedings in a Federal court rests upon and is supported by the jurisdiction of the main suit. Thus, where the principal cause is within the jurisdiction of the court, as a Federal court, the proceeding ancillary or supplemental to it is also within that court's jurisdiction, regardless of the citizenship of the parties or the amount in controversy. In other words, the collateral proceedings come in under the jurisdiction acquired between the original parties, even though jurisdiction would have been lacking if such proceedings had been originally and independently prosecuted * * *"

Accord:

2 Cyclopedia of Federal Procedure (3d, 1951) Sec. 2.428.

In *Baush Mach. Tool Co. v. Aluminum Co. of America,* 63 F. 2d 778 (C.C.A. 2d, 1933) (Cert. den.), a motion to dismiss, for lack of jurisdiction, an appeal from a decree entered in an independent bill for discovery, was under consideration. The bill for discovery showed no diversity of citizenship or other jurisdictional facts, but the principal suit of which the bill for discovery was in aid, involved the Clayton Act. The Court of Appeals, Second Circuit, held that the decree was appealable, and the bill for discovery is "* * * dependent and ancillary for jurisdictional purposes, and jurisdiction over the bill may be sustained because of the jurisdiction had over the action at law * * *" The court said that it was not necessary to decide whether the bill for discovery was supported by Section 12 of the Clayton Act since

> "It is sufficient for the purpose of this appeal to say that the bill is ancillary or auxiliary to the action at law and is thus supported by the undisputed jurisdiction of the action at law." (p. 779)

Youngstown Bank v. Hughes, 106 U.S. 268 (1882), and *Arias v. Usera,* 38 F. 2d 235 (C.C.A. 1st, 1930), relied on by the Appellees (Appellees' Memo., p. 4, 6), involved proceedings to enforce inspection which had no connection with the jurisdictionally supported principal suits, and which, so far as the record shows, might never result in controversies involving the jurisdictional amount.

A clear statement of the principle applicable in the instant case is found in *Brun v. Mann,* 151 F. 145 (C.C.A. 8th, 1906), which involved an action brought in the federal court against the administratrix of the estate of one Tillett, in aid of the judgment which had been rendered in the U. S. Circuit Court. Because the enforcement action was by a separate proceeding and there was no diversity of citizenship, a challenge was made of the jurisdiction of the federal court. The court said:

> "Nor was the right of the complainant to invoke this jurisdiction conditioned by the existence of a federal question or of diversity of citizenship or of the amount in controversy. A bill in equity dependent upon a former action of which the federal court had jurisdiction may be maintained in the absence of either of these attributes (1) to aid, enjoin or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment

> or decree, therein; or (3) to enforce or obtain an adjudication of liens upon, or claims to property in the custody of the court in the original suit. Such a dependent suit is but a continuation in a court of equity of the original suit, to the end that more complete justice may be done * * * (citations omitted) * * *'' (p. 150)

Freeman v. Howe, 24 How. 450, 16 L. Ed. 749 (1861):

> "A bill filed on the equity side of a federal court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under *mesne* or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it has arisen, and is maintained without reference to the citizenship or residence of the parties.''

And in *Krippendorf v. Hyde,* 110 U.S. 276, 28 L. Ed. 145 (1884), a separate proceeding had been brought by a third party to restrain a judgment. A motion to dismiss was filed for lack of diversity of citizenship. The Supreme Court of the United States held:

> ''* * * we think, that the court below should have regarded the present bill, not as an original bill invoking the general jurisdiction of the court in equity, but as an ancillary and dependent bill, equivalent in effect and purpose to a petition in the attachment proceeding itself, incident to and dependent upon it.'' (pp. 286 and 149, respectively)

The only authority referred to by Appellees involving a suit in aid of or ancillary to a principal suit is *Robert Hind, Limited v. Silva,* 75 F. 2d 74 (C.C.A. 9th, 1935) (Appellees' Memo., p. 7). A motion to dismiss the appeal in this court was filed on the ground that the separate equity suit brought for cancellation of a release procured for $84.50 in a personal injury case did not have the requisite value in controversy. This court held that it was the value of the subject sought to be protected in the matter in controversy that was determinative of jurisdiction; and that in an injunction suit it is the value to the plaintiff of the right for which he prays protection, or value to the defendant of the acts of which the plaintiff prays prevention. The court further held that the requirement of Hawaiian law, that a separate proceeding be brought in equity to cancel the release to prevent its use in the principal law action, did not prevent the court from making the determination that the principal action involved a value in controversy in excess of the requisite $5,000.

Contrary to the claim of the Appellees, the principle of *Robert Hind, Limited,* clearly supports the contention here made by Appellants. This, we submit, is true, since the principal suit from which Appellants seek to disbar the Territorial Circuit Judge is a suit which involves the protection of property rights in excess of the jurisdictional amount. It is also clear from *Robert Hind, Limited* that a determination of whether the value in controversy exceeds $5,000 must be made by examining the controversy between the

parties in the principal suit of which the prohibition proceeding is in aid.

II.

THE PROPERTY RIGHTS SOUGHT TO BE PROTECTED THROUGH THESE PROHIBITION PROCEEDINGS INVOLVE VALUES MANIFESTLY IN EXCESS OF THE JURISDICTIONAL REQUIREMENT.

The attempt of Appellees on oral argument to isolate that element of the controversy relative to the appointment of successor trustees, in order to show that the jurisdictional amount is not present, does violence to the established rule of *Berryman v. Whitman College*, 222 U.S. 334, 56 L. Ed. 215 (1912), that jurisdiction is "measured by the value of the right to be protected, and not the value of some isolated element of that right"; and that a subject which is necessarily concluded by the decree must be included into account in considering whether there is jurisdiction over the controversy.

Accord:

Glenwood Light etc. Co. v. Mutual Light etc. Co., 239 U. S. 126, 60 L. Ed. 176 (1915);
Hunt v. N. Y. Cotton Exchange, 205 U.S. 322, 51 L. Ed. 821 (1907).

The trial judge must decide important and highly controverted issues of property rights before the successor trustees may be appointed.[1] Such issues will

[1]Appellants' brief, p. 3, refers to the determination of whether the adopted children of the deceased son of the testator (Appellees

be concluded by the decree and hence, the value in controversy must be determined by considering the value of the property rights sought to be protected.

It is only necessary for this Court to refer to the record, and the affidavit of value in controversy, to determine that the jurisdictional amount has been established under any one of the several tests. Pursuant to the requirements of 28 U.S.C. Sec. 2108, Appellants executed and filed the requisite affidavit at the time of appeal to this Court, setting forth that the value of the trust estate here involved is in excess of $500,000, and that the value in controversy exceeds $5,000, exclusive of interest and costs (R. 53).[2]

A. The interests of Appellants and Appellees in the income and corpus of the trust estate.

At the oral argument, the Appellees, referring to their own brief (Appellees' Brief, p. 3), admitted that "the fundamental question" in the case is whether Beverly Farrington Richardson and John Farrington,

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John Farrington and Beverly Farrington Richardson) had any interest in the trust estate as the "fundamental question"; at page 17 of Appellants' brief the issue is called "the controlling issue of law"; at page 17, fn. 4, it is called "the basic question of the case."

[2]In this brief, Appellees conceded jurisdiction of this Court on appeal. It was not until the day before the oral argument, when Appellees filed a Motion to Dismiss, that any question was raised concerning the jurisdictional amount. The Affidavit of Value in Controversy filed by Appellants (R. 53) did not particularize the exact value of the entire estate other than to state that the value is in excess of $500,000. The value of respective life estates, computed on annuity tables and the life expectancy of the beneficiaries, are each far in excess of the jurisdictional minimums.

Appellants contend the record before this Court substantiates the requisite jurisdictional value. Had a timely counter affidavit or motion been filed, other competent direct evidence could have been submitted pursuant to 28 U.S.C. § 2108.

two of the Appellees herein, being the two adopted children of the son of the testator, Wallace Rider Farrington, have any interest in the trust estate. This question depends upon whether these two Appellees are "issue" of the said testator under the terms of the will (R. 84, 86). If it is determined in the principal suit that these two adopted children are not issue, interests in the estate are affected as follows:

(1) The interests in the life income in the trust estate of the two daughters of the testator, Frances Farrington Whittemore and Ruth Farrington Leavey, two of the Appellants herein, increase from twenty and five-sixths per cent (20-5/6%) to twenty-five per cent (25%) each;

(2) The interest of Appellant Joan Whittemore Close, daughter of Frances Farrington Whittemore, in the principal of the trust estate upon termination of the life estate is increased from thirty-three and one-third per cent (33-1/3%) to fifty per cent (50%);

(3) The interests of Appellants Edmond H. Leavey, Jr., and Catharine Farrington Hite, issue of Ruth Farrington Leavey, in the principal of the trust estate upon termination of the life estates are increased from sixteen and two-thirds per cent (16-2/3%) to twenty-five per cent (25%) each;

(4) Appellees Beverly Farrington Richardson and John Farrington, the two adopted children not being issue, would not receive fifty-eight and

one-third per cent (58-1/3%) of the income of the trust estate, share and share alike, and would not be entitled to thirty-three and one-third per cent (33-1/3%) of the principal of the trust estate upon termination of the life estates; and

(5) Appellee Elizabeth P. Farrington would receive fifty per cent (50%) of the income of the trust estate during her life.

The trust estate here involved being substantially in excess of $500,000, it is clearly apparent from the above itemization of changes in interest revolving around the "fundamental question" in the case that the value in controversy as between individual appellants and individual appellees, both as to the interest of the life income takers and those to share in the distribution of the corpus of the trust estate, are each substantially in excess of the jurisdictional amount of $5,000.[3]

B. The Commissions of Trustees.

Section 9757, Revised Laws of Hawaii 1945, as amended by Act 170, Regular Session 1951 (SR D-223), specifies the commissions payable out of income received during the year to trustees, except trustees of a charitable trust, as seven per centum for the first five thousand dollars, and five per centum for all over five thousand dollars. Upon the principal of the estate, trustees and guardians, except trustees of a charitable trust, are allowed as commissions,

[3]See also footnote 2, page 11 hereof, concerning the true value of the interests here involved.

(1) one per centum on the value at inception of the trust, payable at inception out of principal, (2) one per centum on the value of all or any part of the estate upon final distribution thereof, payable out of principal at termination, (3) two and one-half per centum upon all cash principal received after the inception of the trust payable at time of receipt out of principal, (4) two and one-half per centum upon the final payment of any cash principal prior to termination, payable out of principal at time of final payment, and (5) in addition thereto, one-tenth of one per centum on the value at the expiration of each year during the continuance of the trust payable annually out of principal. This last one-tenth of one per centum does not apply to trust estates created under a trust document which authorizes the trustees to employ others to perform bookkeeping and clerical services at the expense of the trust.

Computing the commissions allowable by statute on income (assuming a reasonable rate of return of even four per cent (4%) on the trust estate of $500,000) and the amounts allowable out of principal during the continuance of the trust and at the time of the termination thereof, it would appear equally clear that the amount of trustees' commissions here involved meet the jurisdictional requirements under the appeal statute.

Each Appellant controverts the right of all the nominees of Appellees to act. Hence the argument that commissions may be allowable in equal amounts to trustees nominated by Appellants or those nomi-

nated by Appellees, we submit, is not an argument in point so far as the basic questions in the prohibition proceedings and appeal thereof are concerned in relationship to the jurisdictional amount. The failure of Circuit Judge McGregor to disqualify himself and the denial of the writ of prohibition by the court below effectively deprive Appellants of a fair and impartial trial, and Appellants' nominees are completely precluded from realization of trustees' commissions in the amount allowed by statute.

C. The control, custody and management of trust assets and the trust estate.

As we have stated above, the Appellants here controvert the right of all nominees of Appellees to act as trustees. Appellants contend that to permit the vesting of title, custody and control of the trust estate in the nominees of Appellees would thereby jeopardize the entire trust estate and the management of the assets thereof. The value of the entire trust estate is therefore involved so far as the matter of jurisdictional requirements has here been raised.

III.

THE ARGUMENTS OF APPELLANTS SHOW CLEARLY THAT THE CONSTITUTION AND LAWS OF THE UNITED STATES, OR AUTHORITY EXERCISED THEREUNDER, ARE INVOLVED.

A. Due process of law under Fifth Amendment.

We have argued that there is such manifest error in the lower court's interpretation of the affidavit for disqualification and in their "statement or appli-

cation of governing principles''[4] in the case, that unless the same were corrected the Appellants would be deprived of a trial under circumstances which amounted to a denial of due process of law.

We invite the Court to examine the record from page 135 to 164 and from it the nature of the controversy that exists between the parties and the presence of both the jurisdictional amount and a federal question will be apparent. The record will show that after the filing of a notice of appeal to this Court, together with a bond for costs (R. 136), notwithstanding notification to the Trial Judge and an attempt to have any hearing stayed pending appeal (R. 136), he proceeded to issue contradictory orders as to whether an amended answer pending before him could be filed. He ruled orally that a second amended answer raising substantial issues of fact as to the disqualification of the nominees would be allowed (R. 163) and after a so-called ''hearing'', outside the presence of counsel signed a written order that the amended answer could not be filed (R. 114). He proceeded to force counsel into the so-called ''hearing'' in which there was no opening, no closing and no opportunity for the Appellants to present evidence of any kind. The Court merely announced at 4:25 P.M., on June 6, 1955, ''that's all for the day'' (R. 164) and without either party submitting the case or permitting Appellants to offer evidence as required by Hawaiian statute (Section 10117, Revised Laws of Hawaii 1945) entered an order next day prepared by Appellees

[4] *Waialua Agricultural Co. v. Christian*, 305 U.S. 91 (1938).

and not shown to Appellants (R. 125) appointing the Delegate and her two nominees trustees and purporting to vest legal title in said trustees (R. 115). None of the orders are effective or can become effective until this proceeding is finally determined and the motion for new trial is acted on or made moot.

While it is true that the events that occurred after the denial of the writ of prohibition are not to be read into the affidavit of disqualification, the entire record must be examined in order to determine what the nature of the controversy is and whether the rights of the parties derived from the Federal Constitution and Federal Statutes will, in fact, be violated.

In Appellants' opening brief (p. 22) reference is made to the opinion in *In re Murchison,* 23 Law Week 4219, 99 L. Ed. 552 (1955) (advance reports). The statement of the Supreme Court that a fair trial in a fair tribunal is a "basic requirement of due process" is not limited to criminal cases. It seems clear from not only the opinion in the *Murchison* case, but *Tumey v. Ohio,* 273 U.S. 510, 71 L. Ed. 749 (1927) (referred to in Appellants' Opening Brief, p. 22-23), that any pecuniary interest of a judge in the decision would constitute the court an unfair and partial tribunal within the prohibition of due process. Mr. Chief Justice Taft, in his very able opinion in the *Tumey* case, reviews the history of judicial disqualification for pecuniary interest and shows that at common law long antedating the Fourteenth Amendment, there was the greatest sensitive-

ness "over the existence of any pecuniary interest however small or infinitesimal in the Justices of the Peace". While in the *Tumey* case the emolument of the court depended upon fines which were to be imposed by the judge, the principles which are stated showing that procedural due process requires a fair trial in a fair tribunal are nevertheless applicable to the case at bar.

In *Payne v. Lee,* 24 N.W. 2d 259 (Minn. 1946), a prohibition proceeding brought to disqualify a probate judge from continuing in a controversy by reason of bias and prejudice, the court specifically held that the denial of a fair and impartial tribunal to adjudicate private rights is in violation of the due process requirement of the United States Constitution:

> "The failure to provide a litigant a fair and impartial tribunal before which to adjudicate his private rights is also in violation of the due process clause of U.S. Const. Amend. XIV. Buck v. Bell, 143 Va. 310, 130 S.E. 516, 51 A.L.R. 855; Stahl v. Board of Supervisors, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185. In the latter case the Iowa supreme court said (187 Iowa 1352, 175 N.W. 776): 'The constitutional guaranties recognize as a primal necessity that there be laws providing impartial tribunals for the adjudication of rights.' See Willoughby, Constitution of the United States, 2d Ed., §1124; 12 Am.Jr., Constitutional Law, §635." (p. 263)

The court further held that even in the absence of a disqualification statute the principle of impartiality, disinterestedness and fairness on the part of

the judge is so much a part of our whole system of judicature that a litigant in a probate proceeding, even though part of the proceeding may be formal or ministerial, is entitled to disqualify a biased judge if judicial functions are involved. The following language of the court seems particularly applicable to the case at bar:

> "Some of the most important property rights of the individual citizen and his family are adjudicated in probate administration, and to deny to any litigant therein the unquestioned right to an impartial hearing violates the fundamental traditions of American justice." (p. 265)

The court quotes with approval *Frome United Breweries Co. v. Keepers, etc. of Bath,* H. L. (1926) A. C. 586, 590, 135 L. T. 482, 483, Lord Chancellor Cave:

> "'. . . if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias *(whether financial or other)* in favour of or against either party to a dispute *or is in such a position that a bias must be assumed,* he ought not to take part in the decision or even to sit upon the tribunal.'" (Italics are supplied by the Supreme Court of Minnesota.)

B. A construction of Section 84 of Hawaiian Organic Act (48 U.S.C.A. Sec. 636) is involved.

The briefs for the Appellants and the brief for the Appellees pursuant to the requirement of the rules

of this Court that the statutory provisions involved be reprinted have both set forth the text of Section 84 the Hawaiian Organic Act which imposes a disqualification of any judge in any case "in the issue of which the said judge" has any pecuniary interest.

The Hawaiian case referred to by Appellees, *Carey v. Discount Corporation,* 35 Haw. 786 (1941), involved disqualification under Section 84 of the Organic Act. It was there held that the degree of financial interest was immaterial and an interest however small is sufficient to render a judge disqualified. See same case, 35 Haw. 811, at 813.

We have argued that Judge McGregor has an interest in the issue of the case proceeding before him by reason of his existing relationship to Delegate Farrington.[5] Delegate Farrington has asserted and Appellants have denied that her adopted children have vested interest in the Farrington estate; and she has asserted and Appellants have denied that she and the nominees are entitled to be trustees of the estate. A decision according with her assertions, it is true, will not directly result in Judge McGregor being appointed or confirmed as a United States Federal District Court Judge. However, in determining the true construction of the pecuniary interest statute we have urged that no matter how infinitesimal, or no matter how small the financial interest may be, the fact that the outcome of the case may have some effect on the application *upon which the Delegate is duty-*

[5]That one of three justices in the court below agreed specifically with this contention (R. 37) should answer any assertion that the argument is "colorable".

bound as the sole representative of the Territory of Hawaii to act, is such a pecuniary interest as to effect a disqualification under the Federal Statute.

The argument that Judge McGregor is exercising power granted under the Federal Statute, namely, the Hawaiian Organic Act,[6] which creates the court, and that Appellants cannot obtain a fair and impartial trial before him in a Federally created court involve a combination of constitutional and statutory questions. We believe in this case, that the error of the court below was so manifest and so clear that it may not be necessary for the Court to reach problems of either statutory interpretation or the Constitution, but if the ultimate result is to deny to the Appellants a fair and impartial trial before a judge who has no interest in the issues coming before him, it will result in a denial of both constitutional and statutory rights. We believe there is a clear analogy between the case before this Court and *Tumey v. Ohio,* supra. The court there pointed out that one of the duties of the presiding judge was a duty to look after the finances of the village so that he was charged with the responsibility of having a pecuniarily successful court. This was a partisan position which the mayor had at the same time he was attempting to exercise judicial functions. The court uses the following language:

> "With his interest as mayor in the financial condition of the village and his responsibility there-

[6]The ten circuit court judges exercise judicial power under 48 U.S.C. § 631, § 633 (Organic Act Section 81, 80).

> for, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine? The old English cases cited above of the days of Coke and Holt and Mansfield are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."

Judge McGregor occupies two seriously inconsistent positions, one partisan, that is, a position of candidate for judicial office in which he can only be successful by some approving action taken by one of the litigants before him; the other judicial, in which he is bound to determine impartially a serious family and property controversy pending before him. We submit that the determination of this delicate question of constitutionality and statutory law cannot be avoided by a statement that the Constitution and statute "are not involved".

CONCLUSION.

A. The Writ of Prohibition is the machinery provided by local law by which an upper court determines whether a lower court is competent to act in a particular matter. The Appellants claim that unless Judge McGregor is restrained, they will not receive a fair trial of Appellants' claims which involve not

only the determination of who shall be Trustees, but involve the adjudication of substantial property rights of a value greatly in excess of the jurisdictional amount. Appellees have cited no authority and it would be subverting the purpose of the Act of Congress if this Court could not, in determining the value in controversy, look to the actual controversy in which Appellants are attempting to obtain the benefit of a fair trial.

B. The requirement of impartiality, disinterestedness and fairness on the part of the judge is so interwoven with the history of social control through our court system, that the denial of the Writ would deny to the Appellants procedural due process required by the Fifth Amendment.

C. The appeal raises a substantial question as to the meaning of Section 84 of the Organic Act.

Wherefore, Appellees' Motion to Dismiss should be denied.

Dated, Honolulu, Hawaii,
January 25, 1956.

Respectfully submitted,
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